Supreme Court, U.S.
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CASE NO. 92-50

IN THE
SUPREME COURT OF THE UNITED STATES

TERM: October, 1991

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KENNETH EDWARD HOLLAND,
Petitioner,

v.

THE COMMONWEALTH
OF VIRGINIA, et al,
Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## REPLY BRIEF TO RESPONDENT EMPLOYER/INSURER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

Inasmuch as there are certain arguments raised in the respondents' briefs in opposition which were not addressed in the petition for writ of certiorari filed in this matter, the petitioner submits this reply brief pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States.

The specific arguments raised by respondents Virginia Bridge and Structures, Inc. (employer), and Liberty Mutual Insurance Company (insurer) are enumerated below, with each argument immediately followed by the petitioner's reply to each:

1) "Pursuant to Virginia Code Section 65.1-40, the rights and remedies granted to an employee against his employer * * * under the (Virginia Workers' Compensation) Act 'shall exclude all other rights and remedies of such employee...at common law or otherwise, on account of such injury, loss of service or death.' Accordingly, jurisdiction over such claims is vested solely in the Industrial Commission of Virginia." (Brief in Opp. at 18)

In this argument, these respondents have ignored pertinent facts regarding both the Virginia statute they quote, and Titles 28 and 42 of the United States Code, which nullify this very argument.

Pursuant to Va. Code Section 65.1-40 (Now recodified as Va. Code Section 65.2-307), the exclusiveness of the Va. Workers' Compensation Act is limited, and applies only to injuries "arising out of, and in the course of employment", as defined in Va. Code Section 65.1-7 (Now recodified as Va. Code Section 65.2-101).

The rights deprivations and the resultant consequential injuries for which damages are claimed in this case, however, do not meet those distinctions, and are therefore not subject to such exclusion under said Act in accordance with the following authorities:

"(T)he Act is exclusive only so far as

it covers the field of industrial accidents * * * (and) leaves unimpaired the common-law right of action for damages for the personal injury or death of the employee when such does not arise out of and in the course of the employment." Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 20 S.E.2d 530 (1942); Va. Code Section 65.2-307 (1991 Repl. Vol.).

In determining whether an injury is one "arising out of employment", the "actual risk" test is applied. Under this test, the worker's injury must be seen to have followed as a natural incident of the work, be a result of the exposure occaisioned by the nature of the employment, and appear to have had its origin in a risk connected with the employment. Such injury must also arise from a risk not shared by the general public. This test excludes an injury which

cannot fairly be traced to the employment as a contributing and proximate cause, whose causative danger is not peculiar to the work. Hill City Trucking v. Christian, 5 Va. App. 106, 360 S.E.2d 867 (1987); Va. Code Section 65.2-101 (1991 Repl. Vol.).

In determining whether an injury occurs "in the course of employment", it is required that such injury must take place within the period of employment, at a place where the employee may be reasonably expected to be, and while he is fulfilling the duties of his employment, or is doing something which is reasonably incidental thereto. Lucas v. Lucas, 212 Va. 561, 186 S.E.2d 63 (1972); Va. Code Section 65.2-101 (1991 Repl. Vol.).

This requirement refers to continuity of time, space and circumstances, only incidentally related to causation. It must be satisfied by a showing of an unbroken

course beginning with work and ending with injury under such circumstances that the beginning and the end are connected parts of a single work-related incident. Graybeal v. Board of Supvrs., 216 Va. 77, 216 S.E.2d 52 (1975); Va. Code Section 65.2-101 (1991 Repl. Vol.).

The petitioner in this case was fired by the respondent employer on March 31, 1988, only six days after his industrial accident, for filing a formal safety complaint. But the damages claimed in this case relate only to the injuries which occurred, at their earliest, on July 21, 1988, and were continually suffered until January 01, 1991, for which he filed his claim in federal court on January 31, 1991. It should therefore be clear that these additional injuries can not be said to be "arising out of and in the course of employment", if for no other reason than

that the petitioner was not actually an "employee" of the respondent employer when the injuries in question occurred.

However, the petitioner's complaint was not filed to claim any additional Workers' Compensation benefits, but only because he has alleged certain fundamental rights deprivations in connection with a Worker's Compensation case which is now terminated, as a result of being unlawfully penalized by these respondents under color of law for merely asserting his rights. Those deprivations, and the consequential injuries they have caused are additional injuries, separate and distinct from those he recieved as a result of his industrial accident, and it is for this cause alone which he has sought damages in federal court.

The Industrial Commission of Virginia has no jurisdiction over matters of federal

rights deprivations. Title 28, U.S.C. Section 1331 gives the federal district courts original jurisdiction of all civil actions arising under the Constitution, and 28 U.S.C. Section 1343 gives them original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation of civil rights and privileges.

"(W)here person acts to deprive another of his federal rights under color of state law [42 U.S.C. Section 1983] provides authority for federal claim." Parker v. Graves (1973 CA5 Fla) 479 F2d 335.

That the enforcement of a statutory penalty is an exercise of power which is traditionally exclusively reserved to the state, it should be self evident that the actions of these respondents can be fairly attributed to the state. But there is also evidence in the record which tends to

suggest that there was in fact, a "meeting of minds" between certain members of the Industrial Commission and these particular respondents, in the form of a copy of an inter-office memo, dated July 19, 1988, which refers to a relevant telephone conversation regarding resubmittal of the respondent insurer's earlier Application for Hearing, previously denied. (See: Brief in Opp. at 2-3; and "Exhibit 7", infra)

It is thus the enforcement of penalty, voluntarily sought and repeatedly imposed by these respondents, unlawfully sanctioned and mandated by officers of the Industrial Commission of Virginia, and continually carried out and fervently defended by these respondents for over two full years, which gave rise to petitioner's cause of action under the federal statute.

In these respects the petitioner

submits that the exclusiveness of the Va. Workers' Compensation Act does not apply, and the federal courts are by law empowered to grant the relief he seeks in this case.

2) "Essentially, the Petitioner * * * seeks federal trial court appellate review of decisions of the State Appellate Courts * * *." (Brief in Opp. at 12)

The petitioner has repeatedly made it clear that he is not seeking appellate review of his Workers' Compensation case in the federal courts, and is not asking for any re-litigation, reversal or alteration of any court decision or opinion entered in that case which is now terminated, but is here pursuing a distinctly separate federal action which merely arises out of the same core of aggregate fact. This fact is clear and uncontestable, being that it is a matter of public record. That an argument such as this should then be entertained by these respondents' attorney, much less formalized in a brief filed in this Court,

is a reckless display of unprofessionalism.

It should be noted here that both of the briefs in opposition filed in this matter contain certain misinformation which the petitioner believes has been purposely included within them to mislead this Honorable Court in its perception of the substantive contents of the record. One such example may be found on pg. 6 of these respondents' brief, where the petitioner is twice misquoted, once as claiming "'additional benefits'", and again as seeking an "'award of defendants'". In both instances, the words here emphasized were substituted for the word "damages". The result is a falsely stated case. Being well aquainted with the particulars of this matter, the petitioner has witnessed many such tactics in the pleadings of these respondents whenever they can not; or will not, plead honestly on the merits.

It is, quite simply, ridiculous to assume that these respondents actually believe that the petitioner has invoked a civil rights action in federal court in order to claim additional Workers' Compensation benefits, or to seek "trial court appellate review"(?) of that issue.

The petitioner submits that the respondents' attorney is, or should be, well aware of the facts presented in this case, and with arguments such as those addressed herein must therefore be attempting outright to deceive this Most Honorable Court, and thus proceeds to defend his clients in clear and purposeful violation of both the Rules of the Supreme Court of Virginia, Pt. 6, Section II, Canon 7, DR 7-102, as well as Rule 11 of the Federal Rules of Civil Procedure.

3) "Holland's complaint is a rambling document consisting almost exclusively of conclusory legal allegations * * * ." (Brief in Opp. at 7)

"Petitioner's Complaint fails to allege any facts to establish state action on the part of (these) Respondents. * * * (Brief in Opp. at 26)

"To the extent that Holland protests the procedure for enforcing the statute, the procedure has already successfully withstood constitutional attack. (Brief in Opp. at 29)

The respondents in this case have consistently pointed to the petitioner's original complaint, and in so doing either feign bewilderment as to the nature and purpose of this action, or offer arguments such as these which merely serve to confuse or disguise the substantive issues he has presented, and invoke technicalities and prejudice, instead of addressing the true merits of this claim.

While ignoring the substance of that complaint, and attatchments thereto, as well as the petitioner's many subsequent

pleadings, and timely filed Motion to Amend his complaint, the respondents, and the Courts below, seemed to hold this pro se petitioner to a higher standard of pleading than that of a practicing professional attorney, even though he has repeatedly made it clear that he has had no formal education in law.

"Complaint alleging violation of 42 U.S.C. Section 1983 and Section 1985 must be specifically pleaded in order to avoid motion to dismiss; however, this rule is not intended to be applied so as to subvert liberal policy favoring amendment of complaints as expressed in FRCivP Rule 15(a), and considerations underlying requirement of specificity must be balanced against equally important policies that pro se litigants not be denied opportunity to state civil rights claim because of technicalities, and that litigation, where

possible, should be decided on merits." Kauffman v. Moss, (1970, CA3 Pa) 420 F2d 1270, cert den 400 US 846, 27 L Ed 2d 84, 91 S Ct 93.

The petitioner has never held himself out to be an expert in pleading and practice, and freely admits that his pleadings have no doubt contained some technical imperfections. Even so, he submits that his complaint was by no means as "rambling" or defective a document as respondents' counsel would have this Court believe, but one which was constructed as clearly and concisely as was possible for him at that particular point in time.

The courts have the discretionary power to overlook such technical defects as may be found in the petitioner's pleadings, even to the point of suspending the rules of court in order to attain the ends of justice. That he was denied proper leave

to amend his complaint, he submits that arguments such as these are irrelevant and immaterial to the substantive issues before this Most Honorable Court, and should be stricken under F.R.C.P. Rule 12(f).

4) "Holland repeatedly claims that he was denied his right to reject medical treatment, but indeed he rejected such treatment and his choice, and right, were vindicated." (Brief in Opp. at 25)

When the petitioner was penalized under the Virginia Workers' Compensation Act, for justifiably asserting his lawful and fundamental rights, the resultant effect of that penalty was in fact a deprivation of those rights, for the simple reason that if a right cannot be exercised with impunity, it makes little sense to assume that any such right has been recognized or respected. That he suffered such a deprivation, along with other consequential injuries, for over two years' time, this argument therefore begs the

question: How long must one be deprived of his rights before he may redress their unlawful denial?

5) "Holland contends that * * * (the lower courts' decisions are) in error and in conflict with 'applicable decisions' of this court, * * * however, Holland points to no authority in support of his assertion." (Brief in Opp. at 16)

There are at present no authorities known to the petitioner which he may cite to specifically support his claim, but isn't this one of the primary aims of our judicial system, to decide upon issues of law which remain unresolved? This fact alone should demonstrate that review by this Court should be granted, because this case presents an issue that has been resolved in prior decisions only through implication, but has not been, and therefore should be, specifically and unequivocally decided by this Court.

## CONCLUSION

The intent of the Virginia Workers' Compensation Act is to protect injured employees. It is stated many times in the Act that it should be liberally construed in favor of the injured employee, in harmony with the humane purpose of the Act. (See: Va. Code Section 65.1-1 (Now recodified as Va. Code Section 65.2-100)).

It is neither remedial, nor humane, but contrary to the stated purpose of the Act (as well as the Constitution of the United States) to enforce its provisions so as to remove from a person all freedom of choice concerning his medical care, and to impose upon him such restrictions on his actions to the extent that he may not act in a manner in which he would normally act if he could pay for his medical care himself.

The petitioner has argued that these respondents had every opportunity, as well as a moral and ethical duty to investigate such matters prior to taking legal recourse before the Industrial Commission of Virginia, and apparently did not, but once those proceedings had commenced, he submits that that duty was multiplied, and all respondents, by counsel, or otherwise, were then morally, ethically, and legally obligated to take action to put an end to those proceedings, and penalty, at a reasonable point in time after recieving information from the petitioner, or any other source, which would give them any cause to know that the petitioner was being treated injustly, in order to prevent the deprivations which are the subject of this action. (See: Rules of the Supreme Court of Virginia, Pt. 6, Section II, Canon 7, DR 7-102; 42 U.S.C. Section 1986)

The Virginia Workers' Compensation Act can not override the Constitution, nor be used to diminish a claimant's fundamental liberties, yet its statutory penalty was imposed upon the petitioner merely because he was prudent enough to try to insure that the benefits of the medical treatment he was recieving reasonably outweighed any possible inherent risk. This in itself is the basis of the fundamental right to refuse medical treatment. As a thinking, feeling, and reasoning human being, the petitioner has asserted that he deserved, if nothing else, the dignity to exercise that right without penalty.

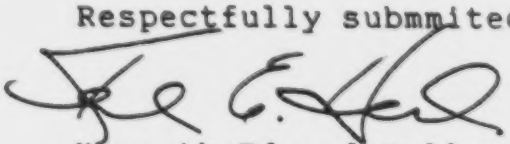
That the petitioner did indeed suffer a statutory penalty for the exercise of that right raises a federal question, which thereby gives the federal courts original jurisdiction over his claim of being deprived of his rights, and may be properly

addressed in a civil action under Title 42 of the United States Code.

That the District Court failed to entertain the substantive issues presented in this case, and refused to grant this pro se petitioner proper leave to amend his complaint, when such amendment could conceivably correct any technical defects as may be found therein, the petitioner was clearly denied full and fair hearing in this matter.

WHEREFORE, the dismissal of his claim by the courts below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and certiorari should be granted.

Respectfully submmited,



Kenneth Edward Holland

## APPENDIX

EXHIBIT 7 — Industrial Commission of Virginia, Inter-Office Memo Dated: 07/19/88

INTER—OFFICE COMMUNICATION

Claim No. _____ Date 7-19-88

To BC

From Grace

Return to _____

Remarks: _____

Call Chuck Deake

Liberty Mutual

Returned to 804-461-6831

Misc 20 4/21/81—100M He will file another appeal on refusal of treatment by Dr. Dillon —

EXHIBIT 7

BEST AVAILABLE COPY